Office - Supreme Court, U.S
FILED
JUN 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1321, 83-1432, 83-1433,
83-1442, 83-1443 & 83-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

TENNECO OIL COMPANY, *et al.*,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL MEMORANDUM OF PETITIONER EL PASO NATURAL GAS COMPANY WITH RESPECT TO SETTLEMENTS BETWEEN THE PARTIES

DONALD J. MACIVER, JR.
Vice President & General Counsel
ARTHUR R. FORMANEK, JR.
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978
(915) 541-2600
Of Counsel

J. ALAN GALBRAITH
(Counsel of Record)
WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Petitioner
El Paso Natural Gas Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1321, 83-1432, 83-1433,
83-1442, 83-1443 & 83-1618

THE PEOPLE OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

TENNECO OIL COMPANY, *et al.*,
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

SUPPLEMENTAL MEMORANDUM OF PETITIONER EL PASO NATURAL GAS COMPANY WITH RESPECT TO SETTLEMENTS BETWEEN THE PARTIES

By letter dated May 31, 1984, the Clerk of the Court advised all counsel in the proceedings captioned above of the Court's direction that counsel be provided with the opportunity of filing a supplemental memorandum discussing the offer of settlement and joint request for approval of stipulation of settlement agreement that was filed with the Federal Energy Regulatory Commission ("FERC") on May 18, 1984, and commenting upon any other agreed upon settlement between parties to these cases which might have bearing upon the pending petitions for writs of certiorari.

Petitioner El Paso Natural Gas Company ("El Paso") welcomes the opportunity to lay to rest any questions which might exist with respect to the relationship between certain settlements to which it is a party and the cases now pending before the Court on petitions for writs of certiorari, and accordingly files this supplemental memorandum.

I. Status of Settlements

On November 11, 1983, El Paso entered into a settlement agreement with Union Oil Company of California ("Union").[1] A brief description of the settlement is set forth in Appendix A *infra*. Pursuant to the settlement agreement, Union filed with the FERC in Docket No. CI84-141 an application for those Commission authorizations necessary to implement the settlement. By order issued May 10, 1984, the Commission directed that a hearing be held on issues raised by the gas sale authorizations sought by Union, and a prehearing conference has been scheduled before an Administrative Law Judge on June 20, 1984.

On May 9, 1984, El Paso entered into a Stipulation of Settlement and Agreement with Tenneco Oil Company ("Tenneco") and Conoco Inc. ("Conoco"). A brief description of the settlement between El Paso and Tenneco and Conoco is set forth in Appendix B, *infra*. On May 18,

---

[1] The settlement agreement provides that either party may terminate the agreement if Union did not receive requisite FERC authorizations by April 1, 1984. Such authorizations were not received, and thus either party to the agreement is free to terminate the agreement at this time. El Paso and Union are in the process of discussing and negotiatiating amendments to their settlement in light of the May 9, 1984 settlement reached between El Paso, Tenneco, and Conoco.

1984, a joint "Offer of Settlement and Agreement" was filed by El Paso, Tenneco, and Conoco with the FERC. On May 30, 1984, the Commission noticed the Offer of Settlement and related applications and has provided that any party desiring to file comments with respect to the Offer of Settlement should, on or before July 2, 1984, file such comments with the Commission; the Commission has also provided that reply comments are due to be filed on or before July 12, 1984.

II. Relationship Between the Settlements and the Cases Pending Before the Court

Neither the Union nor the Tenneco/Conoco settlement disposes of the GLA jurisdictional issue presented to the Court in the pending petitions for a writ of certiorari. Neither settlement renders the matters before the Court moot, in whole or in part. Neither settlement is intended or structured to affect the Court's decision to grant or deny the petitions for certiorari.

It is critical that the Court, and all parties to these cases, understand that neither settlement is self-executing as between the settling parties. Affirmative action by the FERC is required—after appropriate Commission review and consideration of the public interest, the public convenience and necessity, and the reasonableness of the proposed settlement arrangements—before the settlement arrangements can be fully effectuated.

El Paso advises the Court that the proposed settlement arrangements do not terminate any case now pending before the Court, do not dispose of the GLA/PLA jurisdictional issue presented in the pending petitions for writs of certiorari, and do not in any manner lessen the

importance of the Court's grant of the petitions and reversal of the judgments of the United States Court of Appeals for the Fifth Circuit.

What, then, is the purpose of the settlement agreements, if they do not terminate the issues between the settling parties? Even a casual reader of the record will comprehend fully that when the GLA jurisdictional issue presented in these cases is laid to rest by this Court, there will remain—without regard to whether the Fifth Circuit is affirmed or reversed—extraordinarily complex regulatory, economic, and operational questions that, if left to further litigation, may take years for final resolution. El Paso has attempted, therefore, to arrive at an appropriate resolution of all these issues through comprehensive settlement. El Paso believes that the settlement arrangements provide a reasonable, prudent, public interest resolution of a broad spectrum of issues that must be resolved irrespective of the Court's decision on the merits of these cases.

In El Paso's judgment, this is neither the time nor the forum in which to litigate the merits of the settlement proposals. Whether or not El Paso is correct in its assessment that the settlement is in the public interest must necessarily await a full review by the Commission of the totality of the settlement arrangements, which resolve issues of gas supply, gas contracting, gas pricing, natural gas liquids processing, and gas gathering and transportation. The settlement arrangements will stand or fall, dependent upon the Commission's assessment of the settlement arrangements in the light of the public interest as found and determined by the Commission.

Most importantly, it is obvious that the Commission's determination of where the public interest lies will be affected by whether the lease sales are jurisdictional sales as contended in the petitions for certiorari. It is therefore of paramount importance that this Court finally resolve the merits of the jurisdictional issue presented by the petitions. Once the jurisdictionality of the GLA transactions is determined by this Court, there will be a clear standard by which the settlement arrangements can be tested for the traditional regulatory criteria of prudence, justness, reasonableness, and public convenience and necessity. Until this is done, it will be difficult, if not impossible, for the Commission and all affected parties to gauge whether the settlement arrangements are appropriate, in the public interest, and deserving of all necessary Commission authorizations and approvals. The proposed settlement arrangements underscore the need for the Court's prompt determination of the jurisdictionality of the GLA transactions. Indeed, this Court could best serve the public interest by summarily reversing the judgments below, as requested in El Paso's petition.

III. Conclusion

El Paso strongly endorses the granting of certiorari to review the patently erroneous decision below. El Paso concurs in the statement of the Solicitor General in the Reply Memorandum for the Petitioner, p. 6, that ". . . we submit that the future ramifications of this one case alone are themselves sufficiently substantial to warrant certiorari." The filing of the proposed settlement arrangements[2] in no way alters the accuracy of this statement.

Respectfully submitted,

J. ALAN GALBRAITH
(Counsel of Record)

WILLIAMS & CONNOLLY
Hill Building
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Counsel for Petitioner
El Paso Natural Gas Company

DONALD J. MACIVER, JR.
Vice President & General Counsel
ARTHUR R. FORMANEK, JR.
El Paso Natural Gas Company
Post Office Box 1492
El Paso, Texas 79978
(915) 541-2600
Of Counsel

---

[2] El Paso has not reached settlements with Atlantic Richfield Co., Sun Oil Co., and other producers. Hence, the pending settlements if approved do not stop the excessive payments that El Paso makes to these producers.

APPENDICES

APPENDIX A

The El Paso/Union Settlement

The November 11, 1983 Settlement Agreement between El Paso and Union provides for the following:

A. El Paso will reconvey to Union the interests in GLA's 76, 348 and 349 which El Paso acquired from Union's predecessor in interest.

B. After reconveyance, Union will sell gas produced from the reassigned interest pursuant to the terms of a gas purchase contract attached to the Settlement Agreement. In pertinent part, the Gas Purchase Agreement establishes the following terms and conditions:

1. Price: maximum lawful price as permitted under the Natural Gas Act or the Natural Gas Policy Act of 1978, except that NGPA Section 107 incentive regulated gas shall be priced at the NGPA Section 102 applicable monthly price.
2. Term: two years, plus guaranteed renewals for a second term of three years, and a third term of five years.
3. Coverage: all gas produced from the reassigned GLA properties.
4. Market-out: El Paso in its sole discretion, subject only to non-discriminatory application systemwide where similar market-out rights exist, can lower the price otherwise payable to that price which represents the value to El Paso of the gas to be purchased.
5. Take-or-pay: 50 percent or daily stabilized producing capacity, subject to regulation by government authority or force majeure intervention.
6. Processing rights: If El Paso processes Union's gas, El Paso shall receive 23 percent of the liquids as a processing fee.

7. Reservations: Union reserves to itself 25 percent of the gas produced from the reassigned acreage from wells commenced subsequent to the date of first deliveries under the Gas Purchase Agreement.

8. Transportation: El Paso will transport the reserved gas, if requested, charging a transportation fee corresponding to that fee charged for similar services under other agreements at the time such right is exercised.

C. If El Paso notifies Union on or before April 1, 1985 that it proposes to construct a new natural gas processing plant in the San Juan Basin, El Paso's processing fee of 23 percent shall be renegotiated.

D. If by April 1, 1985 El Paso and Union have not reached agreement with respect to a new gas processing plant, Union shall have the option to arrange separately for the processing of gas produced from its properties and sold to El Paso.

E. If El Paso should resolve by settlement with either Tenneco or Conoco its presently outstanding dispute regarding GLA 47, on a basis which includes the execution and implementation of a gas purchase agreement, Union shall have the option to be exercised within 45 days after the effectiveness of such gas purchase agreement to supersede prospectively the gas purchase agreement between El Paso and Union with a gas purchase agreement in form and substance identical to that entered into between El Paso and either Tenneco or Conoco.

F. Immediately upon execution of the settlement agreement, appropriate pleadings will be prepared and filed by Union with the FERC seeking (1) all requisite certificate authority to sell and deliver natural gas to El Paso from wells subject to the FERC's certificate author-

ity pursuant to the terms and conditions of the gas purchase agreement, (2) acceptance of the gas purchase agreement as Union's initial rate schedule, and (3) FERC determination of applicable NGPA prices.

G. In the event Union has not received a FERC certificate and acceptance by the FERC of the gas purchase agreement as Union's initial rate schedule on or before April 1, 1984, either Union or El Paso shall have the right upon written notice to the other to terminate the settlement agreement.

H. If the FERC's certificate and rate schedule orders impose a condition repugnant and unacceptable to Union, it may reject the proferred certificate authority and may cancel the agreement.

I. El Paso and Union agree to amend certain existing gas purchase agreements between them with respect to gas produced and sold from non-GLA acreage, the amendatory agreements being attached to the settlement agreement.

J. For the period of time from October 1, 1983 and ending on the earlier of (a) the date upon which Union accepts all requisite authorizations issued by the FERC regarding the sale and delivery by Union to El Paso of natural gas produced from the reassigned properties or (b) the 91st day after Union's rejection of unsatisfactory FERC authorizations, or (c) the 91st day after either Union or El Paso has duly elected to terminate the settlement agreement, overriding royalty payments are to be made by El Paso to Union on the basis of the applicable first sale maximum lawful price established by the Natural Gas Policy Act of 1978 (but in no event less than the NGPA Section 104 "replacement" rate) less seven cents per Mcf.

K. El Paso and Union agree to execute a motion for submission to the Court in Harris County, Texas in El Paso Natural Gas Company v. Tenneco Oil Company, *et al.* No. 83-50539, dismissing without prejudice Union as defendant in El Paso's declaratory judgment action and dismissing without prejudice Union's counterclaims against El Paso.

APPENDIX B

The El Paso-Tenneco-Conoco Settlement

The Stipulation of Settlement and Agreement between El Paso, Tenneco, and Conoco dated May 9, 1984 and filed with the FERC on May 18, 1984 provides as follows:

A. The Settlement will not become effective until (1) an order of the FERC approving the Offer of Settlement, the Stipulation of Settlement and all operative agreements and issuing all certificates, approving all abandonments within its jurisdiction, and granting all other authorizations that are necessary to implement the Settlement Agreement and permit performance of every operative agreement sought by the parties hereto has issued; (2) such order has become final and no longer subject to judicial review; and (3) such order has been found by each of El Paso, Tenneco, and Conoco to be acceptable to it.

B. Tenneco and Conoco jointly have the option to effect a reassignment of the GLA properties and become conventional sellers while the settlement is before the Commission, but if they so elect, however, their status as conventional sellers will be prospective only, effective upon the grant of necessary sales authorizations from the Commission, and all remedies of all parties as to periods prior to the producers' assumption of status as conventional sellers will be resolved in the event of a jurisdictional decision by this Court through future Commission proceedings.

C. El Paso will reconvey to Tenneco and Conoco the interests in GLA's 47, 52, 60, and 78 which El Paso acquired from the predecessors in interest of Tenneco and Conoco.

D. Tenneco and Conoco will each become conventional sellers of natural gas under gas purchase con-

which contracts establish the following terms and conditions:

1. Price: NGPA prices for §§ 102, 103, 107, 108 gas; $2.00/MMBtu for all other gas through June 30, 1986, reduced on July 1, 1986 to § 106(a) NGPA price level.

2. Term: 20 years.

3. Coverage: all GLA gas, with Tenneco/Conoco to have option to add all presently undedicated San Juan leases to the contract.

4. Market-out: El Paso in its sole discretion, subject only to non-discriminatory application systemwide where similar market out rights exist, can reduce the applicable price to that level which represents the value of the gas to El Paso. Upon an El Paso price reduction, Tenneco/Conoco can withdraw marketed-out gas if abandonment is not required.

5. Reservations: Tenneco/Conoco each reserves 25% of the gas produced from the re-assigned interests, if the reserved gas is not subject to the abandonment requirements of the Natural Gas Act.

6. Transportation: El Paso will transport market-out and reserved gas, subject to receipt of regulatory approvals.

7. Take-or-pay: 60%, both contracts, for 2 years. 75% as to Tenneco, 74.4% as to Conoco thereafter. Take-or-pay limited to state allowables. Full make-up rights for five years, refund in full if not made up.

8. Processing Rights: Tenneco/Conoco have all processing rights. Tenneco/Conoco bear all plant fuel and shrinkage.

E. Liquids extractions will be governed by agree-

ments covering all liquids arrangements, which provide for:

1. El Paso processes Tenneco/Conoco gas in El Paso's existing plants until a new cryogenic plant is built. El Paso will take 23% of the liquids as its fee for five years, and 28% after five years.

2. Tenneco/Conoco will build the new plant on a site provided by El Paso at its Blanco plant site, and upon completion will process their own gas and El Paso's. Tenneco/Conoco will take 39% of the liquids as their fee. The new plant will have a nominal design capacity of 500 MMcf/day.

3. The new plant will become the San Juan Basin base load plant, but all El Paso plants other than old Blanco will remain on stream.

4. El Paso will undertake to keep the new plant at nominal design capacity by delivering gas to fill capacity after Tenneco/Conoco volumes are delivered.

5. Tenneco/Conoco will install, at their sole cost, at least 10,000 H.P. of secondary compression in the new plant; El Paso will idle a reciprocating compressor now in operation.

F. Upon approval by the FERC of the settlement by final order no loner subject to judicial review, Tenneco and Conoco will each pay to El Paso $25 million, and El Paso will flow-through this $50 million settlement fund to its rate-payers in accordance with a Commission-approved plan.

G. After Commission approval of the settlement by final order no longer subject to judicial review, El Paso, Tenneco, and Conoco shall file with theSupreme Court a suggestion of mootness to reflect that a full and final settlement as between these parties has been reached. Such filing would be made in the event that the final

FERC approval not subject to judicial review preceeded this Court's decision on the merits if certiorari is granted.

H. During the pendency of the settlement before the Commission, neither El Paso, Tenneco, or Conoco will initiate new litigation with respect to GLA issues; each party retains the full right, however, to take such actions in existing or future cases as are necessary to preserve its procedural and substantive rights.

I. The Settlement Agreement may be terminated at any time prior to its effective date by mutual written consent of El Paso, Tenneco, and Conoco; by Tenneco and Conoco if the conditions precedent to the effectiveness of the settlement have not been satisfied within the earlier of (1) fifteen months after the date of execution of the Agreement or (2) 180 days after the date of a final order denying certiorari in the cases now pending before the Court; by El Paso if the conditions precedent to the effectiveness of the Agreement have not been satisfied within the earlier of (1) 15 months after the date of execution of the Settlement Agreement or (2) 30 days after the date of the final Decision of the Supreme Court of the United States reversing the Decision of the United States Court of Appeals for the Fifth Circuit in the pending Causes.